upon the ground of fraud and misrepresentation, and that the defendant failed to get what he bargained for.

It is objected that the question of fraud was not submitted to the jury. But there was nothing to submit. The defendants' own testimony negatives that. They knew the patent was in litigation. They wanted such right as the plaintiffs could give them, and obtained it and retained it. It is not the duty of the court to submit the question of fraud to the jury, when the defendants' testimony negatives its existence; and when, if the jury without and against evidence had found it, it would be their imperative duty to set such verdict aside.

The defendants by their letter of 1st November 1875, gave an account of the corn packed by them during the season of 1875. The letter assumes that the packing was all done under their license. They set up no allegation of any other packing than under the plaintiffs' patent. The claim was not made before the jury. Had the defendants desired to raise any such issue, it should have been at the time. The verdict, as we understand it, is upon the amount returned by the defendants and to the payment of which the only objection taken is the invalidity of the patent.

Exceptions overruled.

DICKERSON, BARROWS, DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

Supreme Court of Connecticut.

MORRIS TYLER ET AL. *v.* WILLIAM HAMERSLEY, STATE'S ATTORNEY.

The adjudication of contempt by a court of competent jurisdiction where the proceeding is according to the common law practice, is final and cannot be reviewed by a court of error.

But when the question of contempt is tried upon an issue of law tendered by the party moving in the proceeding and decided upon such issue, the decision must be regarded as a judgment upon which a writ of error may be brought.

A writ of error though operating in ordinary cases as a supersedeas of execution from the date of its service does not have that effect in the case of a peremptory mandamus.

Especially does it not have that effect when the errors assigned have already been before the court and have been decided.

The Superior Court issued a peremptory writ of mandamus, upon the advice of the Supreme Court, upon a reservation of the case for its advice. Before it was served a writ of error was brought to reverse the judgment by which it was granted. The writ of mandamus was subsequently served upon the defendants, but they

refused to obey it, and the court, on motion of the plaintiff, committed them for contempt. *Held*, to be no error.

THE facts of the case are sufficiently stated in the opinion.

R. D. Hubbard and *C. E. Perkins*, for the plaintiffs in error.

W. Hamersley, State's Attorney, and *J. R. Buck*, contrà.

The opinion of the court was delivered by

HOVEY, J.—This writ of error is founded upon an adjudication of a contempt in refusing obedience to a peremptory writ of mandamus. The writ of mandamus was awarded and issued by the Superior Court sitting at Hartford, in accordance with advice given by this court after a full hearing and argument upon a reservation. It was directed to the New Haven and Northampton Company, a railroad corporation created by the laws of this state, of which the plaintiffs in error were directors and officers, and commanded them forthwith and thereafter to stop their regular passenger and freight trains at the depot at Plantsville on their railroad, for the purpose of receiving and discharging passengers and freight. Before it was served a writ of error was brought to this court to reverse the judgment by which the mandamus was awarded. The writ of mandamus was afterwards served upon the railroad corporation, and the plaintiffs in error were duly informed thereof, and also had due notice of the contents of the writ. But they refused to obey its mandate, on the ground that counsel had advised them that it was superseded by a writ of error. Proceedings were then had in the Superior Court against the plaintiffs in error to enforce their obedience to the writ of mandamus, and upon those proceedings they were adjudged guilty of contempt and ordered to be attached and committed to the county jail in Hartford, and to be confined and imprisoned therein till discharged by order of this court or otherwise by due process of law. It was also adjudged that they should pay the costs of the proceedings, and that unless they should forthwith and within twenty days after notice of the order was served upon them obey the writ of mandamus and make return of the same to the court, process should issue against them. Notice having been served upon them, they brought the present writ of error to this court; and the defendant in error moves that it be struck from the docket.

Upon this motion the question which presents itself is whether a

writ of error will lie upon an adjudication of contempt. Writs of error may by statute be brought to this court upon judgments of the Superior Court, and such writs in all cases in which they will lie at common law, are writs of right unless the questions raised by the assignments of error have been already determined by this court upon a reservation. But at common law no writ of error lies except upon a judgment, or an award in the nature of a judgment: Co. Litt. 288; 2 Tidd 1062. It was accordingly held in the case of the *City of London*, 8 Co. 288, that upon a return to a habeas corpus, no issue could be joined or a demurrer taken and that no writ of error would lie thereon. In the case of *The King* v. *The Dean and Chapter of Trinity Chapel in Dublin*, 1 Stra. 536 (s. c. 8 Mod. 27), the doctrine of the case of *The City of London* was fully recognised. In the opinions given by the judges, it was declared that error would not lie upon the award of a *procedendo* or on the return of a rescue: and FORTESCUE, J., stated his belief that on a conviction for contempt error was never brought. In *Groenevelt* v. *Burwell*, 1 Salk. 144 (s. c. 1 Ld. Raym. 454), Lord HOLT, who gave the opinion, admitted it to be good law that no writ of error would lie upon the award of a fine and imprisonment for a contempt.

These cases are sufficient to show that at common law adjudications of contempts by courts of competent jurisdiction are final and cannot be reviewed in a court of error, and the doctrine is strongly supported by numerous other authorities, English and American: *Earl of Shaftesbury's Case*, 2 St. Tri. 615, 1 Mod. 144; *The Queen* v. *Paty et al.*, 2 Ld. Raym. 1105; *The King* v. *Crosby*, 3 Wils. 188; *Carus Wilson's Case*, 7 A. & E. (N. S.) (53 E. C. L. R.) 984; *Ex parte Pater*, 5 B. & S. (117 E. C. L. R.) 299; *State* v. *Powle*, 42 N. H. 540; *Ex parte Kearney*, 7 Wheat. 38; *Yates* v. *Lansing*, 9 Johns. 395; 4 Id. 317; *In re Williamson*, 26 Penna. St. 9; *Ex parte Summers*, 5 Ired. 149; *State* v. *Woodfin*, Id. 199; *State* v. *White*, T. U. P. Charlton 123; *Gates* v. *McDaniel*, 4 Stew. & Port. 69; *Moore* v. *Clerk of Jessamine*, Litt. Select Cas. 104; *State* v. *Tipton*, 1 Blackford 166; *Kernodle* v. *Cason*, 25 Ind. 362; *Clark* v. *The People*, 1 Breese 266; *State* v. *Mott*, 4 Jones Law (N. C.) 449; *Johnston* v. *Commonwealth*, 1 Bibb 598; *Ex parte Adams*, 25 Miss. 883; *Martin's Case*, 5 Yerg. 456; *Watson* v. *Williams*, 36 Miss. 331; *First Cong. Church* v. *Muscatine*, 2 Clark (Iowa) 69. If, therefore, the

petition for the attachment in this case had been proceeded with and the adjudication complained of by the plaintiffs in error had been made in the form and according to the rules of the common law, we should feel compelled to strike the case from the docket, because by those rules, there would have been no judgment or award in the nature of a judgment on which a writ of error would lie. But the parties and the court proceeded with the petition as though it was an original suit, distinct from and independent of the proceedings upon which the peremptory mandamus was awarded, and accordingly on the coming in of the return, the defendant in error formally demurred to the matters contained in it, and the court made the adjudication upon the demurrer.

In view of these circumstances, the counsel for the plaintiffs in error contended that the adjudication must be regarded and treated as a judgment, and that a writ of error lies upon it. And the claim is strongly supported by a decision of the Supreme Court of Vermont. *In re Jesse Cooper*, 32 Vt. 253. That case arose upon a habeas corpus. Cooper, the relator, had been fined by a justice of the peace for a contempt in his presence while holding a court, and had been committed to jail for non-payment of the fine. He brought a habeas corpus before the county court to test the validity of his imprisonment. The jailer made a return, to which the relator demurred; and the county court decided that the imprisonment of the relator was not unlawful and remanded him. The record was then brought before the Supreme Court for revision, and that court held, that as the return was demurred to, and issue joined upon the demurrer, the decision could be revised on habeas corpus.

The ground upon which this decision was made is indeed technical, but it does not differ in that respect from the decision in the case of *The King* v. *The Dean and Chapter of Trinity Church in Dublin*. That case was twice argued before it was decided. Upon the first argument the judges were divided upon the question whether the award of a peremptory mandamus upon motion, and without pleadings or demurrer joined, was a judgment of which error could be predicated. The chief justice was in doubt about it. FORTESCUE, J., thought it hard to maintain that an award which did not contain the words "*ideo consideratum est*" was a judgment on which a writ of error would lie. POWIS, J., seemed to be of the same opinion; and EYRE, J., thought that the award was a judg-

ment on which error would lie because the writ recited that the return was held insufficient "*per quod consideratum fuit, quod fierit breve de peremptorie mandamus, tam in complemento judicii quam in executione ejusdem.*" On the second argument all the judges agreed, but for different reasons mostly technical, that a writ of error would not lie. It was, however, admitted that if the mandamus had been awarded upon an issue joined, either of law or of fact, the results would have been different. With such a precedent as that case furnishes, the decision *In re Jesse Cooper* cannot well be discarded because of the technical character of the reasons assigned for it by the court. And while I would not adopt it as a rule of procedure and thus open the way to this court for writs of error in cases of contempt generally, because, in general, every court must be allowed to judge of its own contempts; yet where parties proceed as the parties proceeded in this case and try the question of contempt upon an issue of law tendered by the party moving in the proceeding, and the court decides the question upon that issue, the decision must be regarded and treated, not as an award merely, but as a judgment upon which a writ of error will lie.

The motion to strike the case from the docket must therefore be denied.

This disposition of the motion of the defendant in error brings before us the proceedings in the court below and imposes upon us a delicate and important duty. In performing that duty, the first question to be considered is how are the rights of the plaintiffs in error affected by the writ of error and to what extent can the proceedings upon which the writ is founded be considered and reviewed in this court.

The answer seems to me to be obvious. Brought here as this writ of error is, by an unusual method of procedure and for the double purpose of staying execution and obtaining a revision of questions which are not ordinarily revisable in a court of error, it should give to the plaintiffs in error no right and secure to them no benefit or privilege to which they would not have been entitled, after commitment, upon a writ of habeas corpus. In the first place the writ of error should not have the effect of staying execution upon the judgment. Should such an effect be given to it, parties guilty of the grossest and most aggravated contempt may set the courts at defiance, obstruct the regular course of justice, and sus-

pend if not totally elude punishment at their own will and pleasure. Contempts are offences at common law against the court as an organ of public justice. The right of punishing them is inherent in all courts and is essential for their protection and existence. From their very nature the punishment, to be effectual, must be immediate and peremptory, and not subject to suspension at the mere will of the offender. Sentences for contempts would amount to nothing if the offenders could supersede them by writs of error, and the authority of courts would be contemptible indeed, if it could be thus eluded and prostrated: 4 Bla. Com. 286, 2 Sw. Dig. 358; *Ex parte Maulsby*, 13 Md. 625; *Ex parte Summers*, 5 Ired. 149; *Johnston* v. *Commonwealth*, 1 Bibb 598.

In the second place, the proceedings upon which the judgment was rendered should not be reviewed except so far as may be necessary to determine whether the court in rendering the judgment acted within the sphere of its jurisdiction. Every court must of necessity possess the power to enforce obedience to its lawful orders and judgments and punish contempts of all kinds against its authority. It is only when it acts without its jurisdiction that its proceedings in such cases will be interfered with or questioned by a superior tribunal. The principle upon which courts proceed in such cases is clearly stated in the celebrated case of *Burdett* v. *Abbott*, 14 East 1, 150, and the case of *The People* v. *Sturtevant*, 5 Seld. 263. In the former case, Lord ELLENBOROUGH, in the course of an able and interesting opinion, observed that if a commitment appeared to be for a contempt of the House of Commons generally, he would neither in the case of that court or of any other superior court inquire further; but if it did not profess to commit for a contempt, but for some matter which could by no reasonable intendment be considered as a contempt of the court committing, but a ground of commitment palpably and evidently arbitrary, unjust and contrary to every principle of positive law or natural justice, he would look at it and act upon it as justice might require, from whatever court it might profess to have proceeded. In the case of *The People* v. *Sturtevant*, the rule laid down by the court was that "a party proceeded against for disobedience to an order or judgment, is never allowed to allege as a defence for his misconduct that the court erred in its judgment. He must go further and make out that in point of law there was no order and no disobedience by showing that the court had no right to judge between the parties on the subject."

The question then arises whether the proceedings in the court below were within the jurisdiction of that court. The record shows that before those proceedings were commenced, a writ of error had been brought upon the judgment by which the writ of mandamus was awarded and was then pending in this court. And it was urged in argument by counsel for the plaintiffs in error, that that writ of error was a supersedeas of the writ of mandamus and operated as a stay of all proceedings for the enforcement of that writ. If this claim is sustainable the court below had no jurisdiction of the proceedings in which the contempt was adjudicated, and its entire action, including the judgment rendered thereon, was *coram non judice* and therefore void: *Kendall* v. *Wilkinson*, 4 E. & B. 680. And it would follow as a necessary consequence that no obligation rested upon the plaintiffs in error or upon the corporation to which the writ of mandamus was directed, to stop their trains at Plantsville as the writ commanded; and their refusal to obey the mandate was an innocent and justifiable act. But the claim is entirely without foundation. It is undoubtedly a rule of the common law, well settled and established, that a writ of error after final judgment and before execution executed is, in ordinary cases, a supersedeas of the execution from the time of its allowance, and by our law it is a supersedeas from the date of the service of the writ. But it is no supersedeas of a peremptory mandamus. In the first place, no return to such a writ is allowed, the courts exacting implicit obedience to its mandate; and such obedience is required during the entire period that the judgment by which it was awarded remains in force and unreversed: High on Extr. Rem., § 567; *Kaye* v. *Kean*, 18 B. Mon. 839. In the second place, the judicial decisions in England and in this country, generally, expressly hold that a writ of error does not operate as a supersedeas to stay the execution of a peremptory mandamus; *Anonymous*, 1 Ventr. 266; *Strode* v. *Palmer*, Trin. T. 2 Geo. I.; Sill. Ent. 248; *The Dean and Chapter of Trinity Chapel in Dublin* v. *Dowgatt*, 1 Peere Wms. 349; *Wright* v. *Sharpe*, 11 Mod. 175; *Lord Montague* v. *Dudman*, 2 Ves. Sr. 396; *The People* v. *Steele*, Edw. Sel. Cas. 505; 2 Barb. 554; *Pinckney* v. *Henegan*, 2 Strob. 250. But we do not choose to rest our decision of this question upon these grounds alone.

There is another reason, which is perfectly conclusive in this case, why the writ of error cannot be allowed to operate as a super-

sedeas. A writ of error is never allowed to have that operation, after the questions raised by the assignment of errors have been determined: *Arnold* v. *Fuller*, 1 Ohio 458; *Bishop of Ossory's Case*, Cro. Jac. 534. See also *Hartop* v. *Hartop*, 1 Ld. Raym. 97, 98. In this case all the questions raised by the assignment of errors had been determined by this court upon a reservation by the Superior Court, before the writ of error was brought. By the rules of this court, that determination settled and established the law of the case and was final; and the judgment which followed in the Superior Court was as conclusive and binding upon the parties as if it had been rendered originally by the Superior Court and afterwards affirmed on error by this court: *Smith* v. *Lewis*, 26 Conn. 110; *Nichols* v. *Bridgeport*, 27 Id. 459; *Fowler* v. *Bishop*, 32 Id. 199. The peremptory mandamus was, therefore, wholly unaffected by the writ of error, and was in full force from the moment it was issued. The plaintiffs in error as officers of the corporation to which the mandamus was directed, were bound to see that the mandate was obeyed. They chose a different course, and in so doing were guilty of a gross contempt of the authority of the court. The reasons assigned in their behalf furnish no excuse for their misconduct, and cannot under the circumstances be received in palliation of their contempt.

There is no error in the judgment complained of, and it is affirmed.

Supreme Court of New York. First Department.

SAMUEL NEWELL, EXECUTOR, *v.* JOSEPH RIDGWAY ET AL.

Where several persons lose their lives by the same event there is no presumption of law as to survivorship based upon age or sex, nor is there any presumption that they all died at the same moment. The law makes no presumption on the subject but leaves the survivorship to be determined as a fact by evidence, and the burden of proof is on the party asserting the affirmative.

Where a devise in remainder is limited to take effect upon a condition or contingency to a preceding estate, and that preceding estate should not arise, the remainder over will vest, as the first estate is taken as a preceding limitation and not as a condition.

A. devised her estate to trustees upon a separate trust as to each of her two children to pay the income to such child during his life, and upon his death the principal to go to the heirs of his body, and in default of such heirs then to the heirs of the body of testatrix then living, and in default of any such heirs of the body of testatrix then to the children or heirs of B., C., D. and E., discharged of all further trust. Testatrix and her two children, both unmarried and without